SUPREME COURT U.S.
FILED
JAN 31 2003

No. 02-271

IN THE

Supreme Court of the United States

DOW CHEMICAL COMPANY, MONSANTO COMPANY, *et al.*,
Petitioners,

v.

DANIEL RAYMOND STEPHENSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN LEGION, VETERANS OF FOREIGN WARS OF THE UNITED STATES, DISABLED AMERICAN VETERANS, VIETNAM VETERANS OF AMERICA, CATHOLIC WAR VETERANS, USA, INC., MILITARY ORDER OF THE PURPLE HEART, AMERICAN EX-PRISONERS OF WAR, BLINDED VETERANS ASSOCIATION, PARALYZED VETERANS OF AMERICA, ITALIAN AMERICAN WAR VETERANS OF THE U.S.A., AMERICAN WAR MOTHERS, LEGION OF VALOR OF THE UNITED STATES OF AMERICA, INC., THE MILITARY OFFICERS ASSOCIATION OF AMERICA, FLEET RESERVE ASSOCIATION, NON COMMISSIONED OFFICERS ASSOCIATION, ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE UNITED STATES, THE VETERANS OF THE VIETNAM WAR, INC., MILITARY CHAPLAINS ASSOCIATION, NATIONAL ASSOCIATION OF MILITARY WIDOWS, NEW JERSEY AGENT ORANGE COMMISSION, OKLAHOMA AGENT ORANGE FOUNDATION, AND AGENT ORANGE VICTIMS AND WIDOWS SUPPORT NETWORK IN SUPPORT OF RESPONDENTS

P.B. ONDERDONK, JR.
NATIONAL JUDGE ADVOCATE
THE AMERICAN LEGION
P.O. Box 1055
Indianapolis, IN 46206

WILLIAM A. ROSSBACH
Counsel of Record
ROSSBACH BRENNAN P.C.
401 North Washington
Missoula, MT 59802
(406) 543-5156

Attorneys for Amici Curiae
(Additional Counsel for Amici Curiae listed on inside cover)

THOMAS A. O'CONNOR
O'CONNOR, MACDONALD & MAZA
FOR VETERANS OF THE VIETNAM WAR, INC.
61 North Washington Street
Wilkes-Barre, PA 18703

TABLE OF CONTENTS

Page

Table Of Cited Authorities iii

Statement Of Interest 1

Statement Of Facts 3

Class Certification And The Settlement Class .. 4

The State Of Medical Knowledge 11

Chemical Company Knowledge Of Agent Orange Toxicity 12

Summary Of Argument 15

Argument 17

I. BECAUSE PETITIONERS KNEW AT THE TIME OF SETTLEMENT THAT IT WAS UNPRECEDENTED AND SEVERELY FLAWED, THAT IT VIOLATED THE DUE PROCESS RIGHTS OF ABSENT, FUTURE CLAIMANTS, AND FAILED TO SATISFY THE REQUIREMENTS OF RULE 23, PETITIONERS CANNOT NOW CLAIM THAT THEY HAD A RIGHT TO RELY ON THAT SETTLEMENT AND EXPECT FINALITY AND NO COLLATERAL REVIEW WHEN VETERANS MADE CLAIMS FOR DISEASES THAT DEVELOPED AFTER 1994 17

II. PETITIONERS HAD THE RIGHT AND DUTY TO ATTEMPT TO CURE THE DEFECTS THEY KNEW FLAWED THIS SETTLEMENT 22

Contents

Page

III. AMCHEM AND ORTIZ DID NOT CHANGE THE WELL SETTLED DUE PROCESS PRINCIPLES UNDERLYING THE REQUIREMENTS OF RULE 23 WHICH HAVE ALWAYS REQUIRED THAT CLASS REPRESENTATIVES SHARE IDENTICAL INTERESTS WITH ABSENT CLASS MEMBERS BEFORE THE ABSENT MEMBERS CAN BE BOUND 24

IV. ANY UNFAIRNESS THAT WOULD RESULT TO PETITIONERS BY AFFIRMING THE SECOND CIRCUIT PALES IN COMPARISON TO THE UNFAIRNESS TO RESPONDENT VETERANS IF THIS COURT SHOULD REVERSE MORE THAN 50 YEARS OF SETTLED CLASS ACTION PRECEDENT AND DENY THEM THEIR DAY IN COURT 28

Conclusion 30

TABLE OF CITED AUTHORITIES

Cases: *Page*

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 9, 18, 24, 25, 26, 28

Boyle v. United Technologies Corp., 487 U.S. 500 (1988) 10, 15

Califano v. Yamaski, 442 U.S. 682 (1979) 27

Crown Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983) 19

Dincher v. Marlin Firearms Co., 198 F.2d 821 (2d Cir. 1952) 18

East Texas Motor Freight System v Rodriguez, 431 U.S. 395 (1977) 26

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 19

Fuentes v. Shevin, 407 U.S. 67 (1972) (*quoting Stanley v. Illinois*, 405 U.S. 645 (1972)) 21

General Telephone Co. of Southwest v. Falcon, 457 U.S. 147 (1982) 26, 27

Hansberry v. Lee, 311 U.S. 32 (1940) 20, 24, 25, 27

In re Agent Orange Product Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983) 5

In re Agent Orange Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984) 6, 9, 10

Page

In re Agent Orange Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1986) 4

In re Agent Orange Products Liability Litigation, 818 F.2d 145 (2d Cir. 1987) 8

In re: General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979) *cert. denied*, 444 U.S. 870 (1979) 21

Ivy v. Diamond Shamrock Chem. Co. (In re Agent Orange Products Liability Litigation), 996 F.2d 1425 (2d Cir. 1993) 7

Keister v. Dow, 723 F. Supp. 117 (E.D. Ark. 1989) 13

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 17

Mace v. Van Ru Credit Corp., 109 F.3d 338 (1997) 26

Marbury v. Madison, 1 Cranch 137, 162, 2 L. Ed. 60 (1803) 29

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 18

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 24, 25, 27, 28, 29

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 19, 23, 27

Page

Sternhagen v. Dow Co., CV-88-158-GF-PGH (D. Mont.) 12

Warth v. Seldin, 422 U.S. 490 (1975) 18

Western Life Indemnity Co. v. Rupp, 235 U.S. 261 (1914) 25

Other Authorities:

Ericksson, Hardell, *et al.*: "Case Control Study on Malignant Mesenchymal Tumors of the Soft Tissue and Exposure to Chemical Substance" Lakartidningen, 76:3872-75 (1979) 11

Hardell: "Case Control Study: Soft Tissue Carcinoma and Exposure to Phenoxyacetic Acids or Chlorophenols" Br. J. Cancer, 39:711-717 (1979) 11

Sheila Hoar, *et al.*, "Agricultural Herbicide Use and Risk of Lymphoma and Soft-Tissue Sarcoma" J. AMA, 256:9, 1141-47 (1986) 11

Morrison, *et al.*, "REVIEW: Herbicides and Cancer" J. Nat. Cancer Inst., Vol. 84, p. 1866 (Dec. 16, 1992) 12

P. Schuck, *Agent Orange on Trial* 153-154 (1987) 8

VETERANS AND AGENT ORANGE: Health Effects of Herbicides Used in Vietnam, Institute of Medicine, (National Academy Press, 1994) 12

Manual for Complex Litigation, Second 19

STATEMENT OF INTEREST

Amici are 22 military and veterans service organizations, collectively representing more than 7,000,000 members.[1] Twelve *Amici* have been chartered by Congress to represent the interests of veterans of the Armed Forces and their families. In the context of this representation, *Amici* join together in solidarity to urge this Court to affirm the Second Circuit and allow Vietnam War veterans who are suffering from fatal diseases caused by their wartime service for this country which were not diagnosed until after 1994, and all Agent Orange settlement funds were gone, to have their day in court.

This unique coalition was inspired by the unstinting leadership of Admiral Elmo R. Zumwalt, Jr. (USN Ret.), who served as Special Assistant to the Secretary of Veteran Affairs and as Chief of Naval Operations during the Vietnam War. In his role as chairman of the Agent Orange Coordinating Council, Admiral Zumwalt provided a forum for many veterans service organizations to coordinate their interests in representing Vietnam veterans affected by Agent Orange.

Amici include the following chartered veterans service organizations: 1) ***The American Legion***, 36 U.S.C. § 41, *et seq.*, with 3.01 million members; 2) the ***Veterans of Foreign Wars of the United States***, § 111, *et seq.*, with 1.86 million members; 3) the ***Disabled American Veterans***, § 90, with 1.2 million members; 4) the ***Vietnam Veterans of America***, § 3801, *et seq.*, with 50,000 members; 5) the ***Catholic War Veterans, USA, Inc.***, § 2601, *et seq.*, with 30,000 members; 6) the ***Military Order of the Purple Heart***, § 821, with 30,000 members; 7) the ***American Ex-Prisoners of War***, § 2101, *et seq.*, with 27,000 members; 8) the ***Blinded Veterans Association***, § 851, *et seq.*, with 10,200 members; 9) the ***Paralyzed Veterans of America***, § 1151,

1. The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici curiae* and their counsel, made any monetary contribution to the preparation and submission of this brief.

et seq., with 20,500 members; 10) the ***Italian American War Veterans of the U.S.A.***, § 1701, *et seq.*, with 10,000 members; 11) the ***American War Mothers***, § 91, with 1500 members; and 12) the ***Legion of Valor of the United States of America, Inc.***, § 631, *et seq.*, with membership restricted to recipients of the Congressional Medal of Honor, Distinguished Service Cross, Navy Cross, or Air Force Cross.

Amici also include the following unchartered organizations: 1) ***The Military Officers Association of America***, with 387,000 members; 2) the ***Fleet Reserve Association***, with 170,000 members; 3) the ***Non Commissioned Officers Association***, with 65,000 members; 4) the ***Enlisted Association of the National Guard of the United States***, with 85,000 members; 5) ***The Veterans of the Vietnam War, Inc.***, with 10,000 members; 6) the ***Military Chaplains Association***, with 1,600 members; 7) the ***National Association of Military Widows***; 8) the ***New Jersey Agent Orange Commission***; 9) the ***Oklahoma Agent Orange Foundation***; and 10) the ***Agent Orange Victims and Widows Support Network***.

Amici do not idly request that this Court affirm the Second Circuit to permit these veterans access to justice. Many *Amici*, especially the American Legion and Vietnam Veterans of America, for decades have actively pursued scientific research or have assisted others in developing scientific information concerning the health effects on Vietnam veterans of their exposure to Agent Orange and dioxin. *Amici* have also petitioned Congress to authorize scientific studies regarding exposure to herbicides. As the average 20 year latency period for certain causally related injuries, such as cancer, passes, these studies are now creating a body of evidence that leaves little doubt that these Vietnam war veterans were injured by Petitioners' defective products in the process of serving our country.

STATEMENT OF FACTS

Dan Stephenson and Joe Isaacson are Vietnam veterans who honorably served their country during wartime. Although both were exposed to Agent Orange, a potent combination of 2,4-D and 2,4,5-T and their highly toxic contaminants, dioxins and furans, both were leading normal, healthy lives in 1984, with no thought or expectation that they might one day be stricken with deadly cancers caused by their wartime exposures to Agent Orange.

Because they had no reason to know that they would ever suffer any disease from their exposures, and at that time had no injury from their exposures, they had no reason to know or receive notice that there was a class action certified on behalf of veterans who claimed injury from their exposures to Agent Orange. Likewise, when the class action was settled in May of 1984, neither learned of that settlement or would have had any reason to know of it. Neither knew that the definition of the class for purposes of the settlement had been expanded to purportedly include veterans like themselves, who had no injuries then, but who might suffer them in the future. Nor did they know that although the first class that was certified, which did not include them, provided for an opt out period, the second class for settlement, which purported to include them, did not. The purported future claimant class that was settled in May 1984 was not the same class that was certified in December 1983.

The only opt out rights that were provided to any veteran was a right to opt out of the originally certified class which was limited to "persons injured" or "persons claiming injury" from exposure to Agent Orange in Vietnam. JA 84-85. Because neither Isaacson nor Stephenson claimed any injury, indeed had no legally cognizable injury at the time this notice went out, they were not members of that class, nor did they receive notice of the class certification and opt out deadline. They thus did not opt out and had no reason to.

It is critical to point out that the class that was certified only included persons who actually claimed manifest injuries **because the Petitioners insisted on it** and the District Court

agreed. At a hearing before the Special Master, in August of 1982, more than a year before class certification, the plaintiffs' attorney unsuccessfully tried to have the class broadly include everyone who was in the armed services in Vietnam and exposed to Agent Orange, potentially up to 2.4 million people. JA 57, 63, 67. Lawyers for the Petitioners made it clear to the court that any such class definition was improper and failed to meet the requirements of Rule 23. JA 48, 58-60. The lawyer for Monsanto insisted that: "to the extent that they plead a claim on behalf of people that are not sick, that is not a claim upon which relief can be based. It is a defective claim. It should be dismissed." JA 60.

Although the attorney representing claimants refused to give up making claims for persons simply based on exposure, without manifest injuries, it is apparent from the record that the Special Master hearing these arguments was critical of that position and not persuaded.[2] JA 62. At that hearing attorneys for Dow pointed out that if the plaintiffs' theory about the class were proper that would mean that individual notice would have to go out to every one of the supposed 2.4 million that served in Vietnam. JA 56-57. And, of course, that never happened.

Class Certification And The Settlement Class

A class was conditionally certified by Judge Pratt on December 29, 1980. *See In re Agent Orange Product Liability Litigation*, 506 F. Supp. 762 (E.D.N.Y. 1986). That class was defined as including "persons who claim injury" from exposure to Agent Orange. *Id.* at 787-792. Judge Pratt expressly declined to do any analysis whether the Rule 23(a) requirement of adequacy had been met by the class representatives because no class representatives had yet been identified. *See id.* at 787-88.

The class was finally certified by Judge Weinstein in December 1983. In the class certification order the class was

2. At one point the Special Master skeptically pointed out that the attorney's claim of a broad class membership for even at risk claimants was adverse to the exposed veterans' interest because it created statute of limitations problems for those individuals who had not yet any manifest disease or injury which might eventually bar their recovery. JA 67.

defined as persons "who were injured" while in Vietnam by exposure to Agent Orange or other phenoxy herbicides, JA 107, *see In re Agent Orange Product Liability Litigation*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983), and the notice was designed to catch the attention of persons who "claim injury . . ." *Id.* at 734. Judge Weinstein did no independent analysis of whether the adequacy requirements of Rule 23(a) had been met. Rather, he merely cited to Judge Pratt's earlier order, and stated that "[t]he four prerequisites as they applied to this litigation have already been carefully analyzed by the court and found to exist." *Id.* at 721. Once again, an evaluation of adequacy would have been impossible since the class representatives still had not been identified.

The opt out period for that class ended on May 1, 1984. On May 7, 1984, Petitioners and lawyers representing veterans who actually had injuries settled the original Agent Orange cases, and in doing so, re-defined and vastly broadened the definition of the class to include persons who had not even manifested an injury. JA 88, 96. However, in contrast to the class certification notice with the narrowly defined class which did not include Respondents, the notice of class settlement to the much broader purported settlement class contained no opt out right at all. JA 96, 106-109. Petitioners are therefore misleading when they state that all class members had notice of the settlement and the right to opt out. Pet. Br. 35. The class that was certified did not include Respondents who had no reason to "claim injury" and the right to opt out of that class was gone by the time the settlement was reached. Stephenson and Isaacson only arguably fit within the definition of the purported class when it was re-defined, after the opt out time had ended. JA 129-132.

Petitioners state that persons in the settlement class had notice of the settlement. What they do not state is how the notice of the settlement was broadcast much more narrowly than the notice of class certification, even though the settlement class was defined much, much more broadly than the certified class. The certified class provided notice by television and other broadcasting media, as well as direct mail and newspaper, while

the settlement class was provided notice only by direct mail and print media. *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 763 (E.D.N.Y. 1984). The broad reach of television was bypassed. Although, while broadening the class definition, the Petitioners and plaintiff lawyers thus reduced the amount of notice that was given.

Neither Stephenson nor Isaacson received notice of the settlement class that purportedly now included them. Even if they had wanted to, without notice, they had no chance to litigate or object, and they were denied any right to opt out of the settlement.

It is again critical to point out that lawyers for Petitioner chemical companies knew before the class was certified that there would be great Due Process problems if the class definition changed after the notice of certification. The lawyer for Diamond Shamrock argued that if, after the notice went out, the class definition changed, and some people were no longer included, then there would be "serious dangers of prejudice" to people who relied on the notice. JA 83. Of course, the opposite situation, as here, would be equally dangerous and prejudicial. Because of the change in the class definition after the class was certified, Stephenson and Isaacson were supposedly included in the class defined for settlement without notice and without an opportunity to opt out. In effect, the class had expanded and been converted into a mandatory, no opt out class.

Petitioners suggest that Respondents' inability to opt out or object is irrelevant because the fairness of the settlement was fully litigated by persons "situated identically," Pet. Br. 32, the "risk of error is low," Pet. Br. 43, and the standard of review should thus be high. But it is indisputably not true that persons situated identically fully litigated these same issues: no one has been before the court in the identical situation before. All the class representatives at the time of the settlement in 1984 had manifest injuries. JA 80, 127, 129. All the lawyers involved in litigating any issue before the court had clients with manifest injuries. No lawyer ever appeared on behalf of veterans with unknown or speculative future claims.

In later litigation, plaintiffs Ivy and Hartman's injuries, although not present at the time of settlement, were manifest before 1994. Both therefore were entitled to compensation from settlement funds that were still available. *Ivy v. Diamond Shamrock Chem. Co. (In re Agent Orange Products Liability Litigation)*, 996 F.2d 1425, 1433-34 (2d Cir. 1993).

Again it is critical to note that before the class was certified, lawyers for Petitioners expressed clearly and unequivocally their position that certification of the class was improper because the class representatives had not even been chosen. The lawyer for Diamond Shamrock argued that without the identity of the class representatives, there could be no determination whether the adequacy and typicality requirements of Rule 23 had been met. JA 78. He argued that the class could not be certified because the court did not have enough information to make such a determination: "[W]e should ascertain a full profile of each of the representative claimants and find out if there are complaints outstanding, or which indicates there is an area not being represented." *Id.*

At the same hearing on class certification, the lawyer for Hercules argued that there was a great problem of class certification without first identifying the class representatives because without that information there could be no determination "as to whether they are representative." JA 81. He insisted that "there is no way it should proceed as a class action until the determinations have been made that they are representative." JA 82.

Despite their knowledge that Rule 23's requirements of adequacy of representation had not been met when the class was certified, and despite their knowledge that there was no class representative that was identically situated as Stephenson and Isaacson were then, without manifest injuries, lawyers for Petitioners went ahead and worked together with plaintiffs' lawyers to broadly define a settlement class to include future claimants and gave any future claimant no opportunity to opt out, even if he or she knew they were included in the newly defined settlement class. Petitioners demanded a provision that

allowed them to walk away from the settlement if too many veterans opted out. P. Schuck, *Agent Orange on Trial* 153-154 (1987); JA 96. Veterans with claims were not afforded a similar opportunity to abandon the settlement, nor an option for a back-end opt out, nor an option for a renewed opt out. *Id.* Petitioners sought to have the class as inclusive as possible, including unborn children. *Id.*

Any question why these plaintiff lawyers would collude with Petitioners and their counsel to broaden the class definition on the eve of trial to take away the rights of future claimants, who they did not represent, is answered by the record below. These lawyers were in desperate financial condition, JA 148-160, facing a trial before a judge that thought their case was weak against well heeled chemical companies. *See id.* And, as later revealed, they had entered a spurious financial arrangement that produced great incentive to settle to provide a nuisance value amount to their clients with present injuries. *In re Agent Orange Products Liability Litigation*, 818 F.2d 145, 156-57 (2d Cir. 1987).

Not only did newly included future claimants have no right to opt out of the settlement, if they had received notice they would have been told that the only issue that was to be decided at any future hearing was the "fairness" of the settlement. Nothing in the notice told them they could object to the adequacy of representation. JA 109. However, although the settlement notice told persons who received it that there was a settlement, it provided no information whatsoever about what money would be paid to whom, and for what injuries. The settlement notice only provided for claim forms to be submitted by persons who "currently" have health effects. It did promise, however, that some funds may go to claimants with future injuries after the numbers of persons with current claims was known and reviewed. JA 112. Thus, anyone receiving this notice who did not have any current known health effects would not have any way to submit a claim or have any knowledge of what the settlement would provide to him or her in the future.

For veterans such as Stephenson or Isaacson, even if they had notice of the settlement and understood that it included them, to take any legal action at that time to object or otherwise try to contest the settlement would have required an expenditure of time, effort and money to hire an attorney to investigate and prepare a response to the court on their behalf. Without any health problems at the time related to Agent Orange and no evidence or reason to expect that they would eventually get cancer associated with Agent Orange exposure, Stephenson and Isaacson would have had no incentive to suffer the expense of contesting the settlement. This Court has recognized this predicament for potential class members. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628 (1997). ("Even if they fully appreciate the significance of the class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.")

It is apparent from the record of the proceedings below that even if Stephenson and Isaacson had come forward and had suffered the expenses of appearing and objecting to the settlement, it would not have done them any good. The only opt out period had passed, before they were even in the class. And, in the face of overwhelming objection to the settlement from veterans, the District Court approved the settlement.[3] *Agent Orange*, 597 F. Supp. at 761.

It is also apparent from the record that when one lawyer objected to the propriety of including future claimants in the settlement class, the District Court deemed the lawyer making the argument had no standing to object to the settlement on behalf of absent future claimants because his clients had injury claims, had received notice, and most had decided to accept. JA 189-190[4] Moreover, the District Court believed that under

3. *See, e.g.* JA 134-136; *see also Agent Orange*, 597 F. Supp. at 761.

4. The Court: Are you representing those members of the class who are not your clients in this argument? That is the question that I am putting to you [?].

(Cont'd)

the settlement veterans who manifested injury later "would be entitled to compensation in the future." JA 129. The court stated that allocation under the distribution plan would have to "take of care" of the future claimants. JA 129.

When the final distribution plan was developed, submitted to the court and approved, it failed to meet the promises made by the court during hearings on the settlement. The distribution plan did not provide any money at all for veterans who might contract cancer after 1994, even though the court knew that latency periods for cancers from toxic exposure might be as long as 40 years. *See Agent Orange*, 597 F. Supp. at 795 ("[i]t took almost forty years for solid tissue cancers to develop in victims of atomic bombing in Japan").

Nevertheless, the District Court characterized the case against the chemical companies as weak at the time of the settlement due to lack of evidence of causation and fraught with difficulty due the government contractor defense. The court could not have known what the chemical companies knew about the true toxicity of their products and apparently did not fully appreciate that the science and medicine of Agent Orange was progressing rapidly and that before the settlement and distribution plan was terminated, the government contractor defenses that concerned the court would be restricted by the Supreme Court. *See Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988).

(Cont'd)

> Mr. Taylor: I do not believe that I can do that. I'm only representing my clients who are members of the class.
> The Court: And did you send each one of them written notice in time to opt out?
> Mr. Taylor: That is correct.
> The Court: With a suggestion that they do opt out?
> Mr. Taylor: That is correct, your Honor.
> The Court: I see.

JA 190-191.

The State Of Medical Knowledge

Because of the well known long latency periods for many diseases, and particularly cancers, from toxic exposures, the incidence of diseases and cancers in agricultural workers and in veterans exposed during their service to Agent Orange was beginning to increase rapidly, making case reports and statistical studies of these diseases more common and more likely to show an association between exposure and a particular disease or cancer. Because the chemical companies had many scientists and health care professionals on their staff, they were very aware of this growing association between these chemicals and cancer. They had to know when they settled the pending Agent Orange litigation in 1984 that the body of medical evidence of this association was increasing. *See generally* JA 137-44, Welch Affidavit, JA 294-99. That gave them great incentive to push the settlement to include, and preclude, claims of future victims.

The first public knowledge of the herbicide-cancer linkage came from Sweden with clinical reports in the late 70's by Hardell and others. Ericksson, Hardell, *et al.*: "Case Control Study on Malignant Mesenchymal Tumors of the Soft Tissue and Exposure to Chemical Substance" Lakartidningen, 76:3872-75 (1979). Dow in particular was very aware of this work. These were followed with epidemiological studies by the same author and his group. Hardell: "Case Control Study: Soft Tissue Carcinoma and Exposure to Phenoxyacetic Acids or Chlorophenols" Br. J. Cancer, 39:711-717 (1979). In the United States, the Journal of the American Medical Association published in September 1986 a report of a study of Kansas farmers exposed to herbicides. The study found that there was a statistically significant dose response relationship between the number of days sprayed and an elevated cancer risk. The risk of Non-Hodgkin's Lymphoma — the same disease Joe Isaacson suffers — greatly increased for those who reported exposures for more than 20 days per year. Hoar, *et al.*, "Agricultural Herbicide Use and Risk of Lymphoma and Soft-Tissue Sarcoma" J. AMA, 256:9, 1141-47 (1986).

By 1992 there was a consensus that there was a positive association between herbicide exposure and Non-Hodgkin's Lymphoma. Morrison, *et al.*, "REVIEW: Herbicides and Cancer" J. Nat. Cancer Inst., Vol. 84, p. 1866 (Dec. 16, 1992).

Finally, as a result of intense political activity by these amici and others, including individual veterans, Congress mandated the Department of Veterans Affairs retain the National Academy of Sciences to study the association of Agent Orange exposure. That study, entitled *VETERANS AND AGENT ORANGE: Health Effects of Herbicides Used in Vietnam*, Institute of Medicine, (National Academy Press, 1994), on the basis of three years of study of all available literature and research, concluded in its seminal report that the evidence was sufficient "to conclude that there is a positive association between exposure to herbicides 2,4-D, 2,4,5-T and its contaminant TCDD [dioxin] . . . and non-Hodgkin's lymphoma." *Id.* at 548. It also found that the evidence was suggestive that there was an association with multiple myeloma.

Chemical Company Knowledge Of Agent Orange Toxicity

The chemical companies had every reason in 1984 to anticipate that, as time passed, there would be replication of the early findings of Hardell and other associations would be increasingly likely as the latency periods of these diseases were being reached. Moreover, they also knew that their own internal information showed how toxic these herbicides really were.

After the Agent Orange settlement was approved, in other litigation against the same chemical companies for injuries alleged to be caused by exposures to 2,4,5-T and 2,4-D, documents have been produced which show that Dow and other manufacturers were engaged in a cover-up to keep their knowledge of the severe toxicity of these phenoxy herbicides a secret from the government and the public, and particularly to hide their knowledge of the contamination of these products with dioxin. *See, e.g., Sternhagen v. Dow Co.*, CV-88-158-GF-PGH (D. Mont.).

Dow documents show that Dow had knowledge of serious health risks posed by chlorinated hydrocarbons long before it sold Agent Orange to the government to use in Vietnam. Dow had knowledge since the 1940s that chlorinated herbicides were toxic to humans and animals.[5] Internal memoranda describe Dow's history of toxic problems with its chemical herbicides acknowledging numerous chloracne outbreaks in various herbicide production facilities over the years. Report from Widger to Coulter, Midland Division Research and Development, 4/25/67. Most notably, that report also made clear that the problem was more than a simple skin rash: ". . . we must keep in mind that chloracne is cosmetic evidence of the attack and serious liver damage is an invisible effect of the attack." *Id.*

An internal Dow 1965 report found that "The materials known to cause chloracne in humans are usually chlorinated complex organic molecules." Larry Silverstein, "The Chloracne Problem – Biochem's Contribution." Bates No. 0001 112 (March 10, 1965). Dow's scientists specifically stated that one of the chemicals apparently causing chloracne was an impurity in its herbicides, namely dioxin. The report stated: "This compound (dioxin) and others which have been shown to cause chloracne have also been shown by animal tests and some human experience in other companies to produce liver damage if the exposure is more extensive." *Id.*

Dioxin was not then unknown to Dow and other chemical companies. In 1957, the German chemical company, Boehringer, had written to Dow offering information about the "very, very toxic" chemical dioxin, about chloracne, and about the preparation of trichlorophenol. Letter from Dr. Wey, C. H. Boehringer Sohn, to Dow Chemical Company, Attn: Leonard Rivkin (Feb. 11, 1957); *See also* Silverstein, Biochem's Contribution.

---

5. One of the head toxicologists for Dow for 50 years, V.K. Rowe, has admitted in a deposition in other litigation, *Keister v. Dow*, 723 F. Supp. 117 (E.D. Ark. 1989), that Dow conducted research in the early 1940s on animals to determine the toxicity of certain of these compounds.

During the 1960s while having trouble with chloracne outbreaks, Dow decided to conduct a series of meetings "to share our findings" with other herbicide producers about the toxicity and impurity problems with its chlorinated herbicides. In a letter to the technical and medical people at Monsanto, Hooker Chemical, Diamond Alkali and Hercules, V.K. Rowe from Dow invited them "to come to Midland to discuss the toxicological problems caused by the presence of certain highly toxic impurities in certain samples of 2,4,5-T and related materials." Letter of V.K. Rowe, Dow Chemical Co., to Monsanto, Hooker Chemical, Diamond Alkali and Hercules, (Mar. 19, 1965). At a meeting in Midland on March 24, 1965, Dow shared with other producers "the medical side of the Dow experience." At the meeting Dow showed slides from animal tests. Its scientists shared techniques for doing chemical analysis for dioxin and other impurities and discussed industrial hygiene measures. V.K. Rowe, Dow Chemical Co., "Report on the Chloracne Problem Meeting on 3/24/65" (Mar. 29, 1965).

During this same time, Dow was sharing samples of its products with other producers and testing and analyzing other producers' products. For example, in a letter to Paul Hoffman from Dr. R. Emmet Kelly (medical director at Monsanto Chemical Company), dated March 17, 1965, Kelly described receiving a sample of dioxin from Dow which was described as "the most toxic compound they have ever experienced." Letter of Dr. R. Emmet Kelly, Monsanto, to Dr. Paul Hoffman (Mar. 17, 1965).

While sharing chemistry and toxicological information with its American counterparts, Dow was also working with European herbicide producers to learn how to reduce the impurities in its chemical production. Internal Dow documents indicate that in late 1964, Dow had an agreement to obtain from Boehringer a secret report about chloracne active substances in chlorinated herbicide production as well as operating procedures to reduce them. Letter from Dr. Kudszus and Dr. Merz, C. H. Boehringer Sohn, to Dow Chemical Co. (Dec. 15, 1964).

Although the focus of Dow's research in the 1960s was on 2,4,5-T, Dow documents show that since the 1940s it has known that 2,4-D was also highly toxic and that 2,4-D and other dichlorophenols were associated with chloracne. Chloracne was not just associated with the trichlorophenols. A 1945 report on the handling hazards of 2,4,5-T compared it to 2,4-D and in some regards found 2,4-D to be even more toxic. Dow Chemical Co., "Toxicity of 2,4,5-Trichlorophenoxy Acetic Acid" (Aug. 8, 1945). Other reports from Dow Biochemical Research concerning the chloracne problem at the Dow plant in Fort Saskatchewan, Doe researcher Larry Silverstein found that 2, 4-dichlorophenol salts showed slight to moderate chloracnegenic activity and that laboratory studies on decomposition of chlorinated phenols indicated "definite possibility of an acne hazard from overheated or decomposed materials." Larry Silverstein, Dow Chemical Co., "Chloracne Problem at Fort Saskatchewan Plant, Dow Chemical Canada" at Dow Bates No. 746402 (Mar. 21, 1969).[6]

SUMMARY OF ARGUMENT

The Agent Orange settlement was legally and factually unprecedented then and remains so today. For veterans such as Dan Stephenson and Joe Isaacson who were healthy, and without any injury at the time, this class action settlement purported to bind them, without adequate representation, without any right to opt out and without payment of any compensation because their injuries became manifest after the settlement funds had been disbursed. Petitioners knew full well that trying to reach so far in binding absent parties, who did not yet even have causes of action, was not supported by any precedent or other authority and violated the constitutional requirements of Due Process and standing. Nevertheless, in the face of the known, overwhelming flaws in their purported settlement, Petitioners went ahead and entered an agreement with lawyers for plaintiffs who were desperate and had strong financial incentives to settle.

---

6. These Dow internal documents suffice to defeat any government contractor defense. *See Boyle*, 487 U.S. 500.

When they entered that settlement Petitioners knew also that medical evidence was likely to increase as the latency periods for cancers and other diseases were being reached from exposures to their toxic chemical products. They knew from their own internal studies that the herbicides used in Agent Orange were highly toxic and were contaminated with one of the most toxic materials then known, dioxin.

Despite entering this settlement with full knowledge of its legal and factual flaws and full knowledge that it was likely that there would be many future provable claims, Petitioners assert that it would be unfair to permit review of this settlement now. But the passage of time and the payment of nuisance value money to veterans who had claims then does not, and cannot, alleviate the severe Due Process violations to Respondents who have claims now. Petitioners' pleas for fairness ring hollow in the light of their knowing violation of the rights of future claimants such as Respondents.

The Second Circuit decision is based on well settled principles of class action jurisprudence and merely followed the guidance of this Court from Amchem and Ortiz. Those decisions, too, broke no new legal ground, despite Petitioners suggestions to the contrary. The dominant Due Process concern of this Court in reviewing class actions has always been to protect the rights of absent class members to ensure that they are not unfairly bound to judgements or settlements by class representatives with interests that are not aligned with theirs. Adequacy of representation is the cornerstone of these Due Process principles in this context. It cannot seriously be disputed that these veterans who had no cognizable claim at the time, who could not opt out, and who could receive no compensation when their injuries became manifest, did not have adequate representation of their interests. As such, the decision of the Second Circuit must be affirmed and Respondent veterans be permitted to proceed with their claims.

ARGUMENT

I. Because Petitioners Knew At The Time Of Settlement That It Was Unprecedented And Severely Flawed, That It Violated The Due Process Rights Of Absent, Future Claimants, And Failed To Satisfy The Requirements Of Rule 23, Petitioners Cannot Now Claim That They Had A Right To Rely On That Settlement And Expect Finality And No Collateral Review When Veterans Made Claims For Diseases That Developed After 1994

The 1984 Agent Orange settlement which purported to include future claimants such as Respondents did not meet the requirements of Rule 23 violated Due Process because veterans like Stephenson and Isaacson, who had no manifest injury, were not adequately represented by someone with interests identical to theirs, had no notice of the settlement, and had no right to opt out. They were purportedly bound to a settlement and precluded from pursuing their rights to their claims in the future, but no compensation was provided.

It is axiomatic that before one can plead for fairness and equity, one must come to the bar with clean hands. Petitioners do not have the "clean hands" that would give them a right to claim that it would be unfair to them now to affirm the Second Circuit and allow Respondents their day in court.

The record of the litigation leading up to the Agent Orange settlement shows that until they jumped at the chance to settle all present claims for nuisance value and to bind and preclude all future claims for little or no compensation, Petitioners, through their counsel, had vigorously — and properly — objected to inclusion in the class litigation of people without present injuries or manifest symptoms. They knew that veterans who were exposed to Agent Orange, but who did not have any manifest injuries could not have brought a claim to begin with. Persons without injury would have had no standing under Article III of the United States Constitution to bring a claim at all. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) this Court established an "irreducible constitutional minimum of

standing" which requires that "the plaintiff must have suffered an 'injury in fact' — an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" (Citing *Warth v. Seldin*, 422 U.S. 490, 508 (1975) and others).

Without injuries and standing to bring a claim, any claims would have been dismissed. Petitioners knew that the they were getting more from the settlement than they had any right to expect. They were settling claims that could not have been brought in the first place. As Judge Friendly said in *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952):

> Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a nonexistent railroad. For substantially similar reasons, it has always heretofore been accepted as a sort of logical axiom that a statute of limitations does not begin to run against a cause of action before that cause of action exists.

It is only in that same topsy-turvy land that your claims can be settled by others, without your knowledge, for no compensation, before your cause of action exists.

Petitioners knew the settlement of future claims under these circumstances was unprecedented. They had to know that such a settlement was at risk due to the many problems it had in meeting those requirements of Rule 23 which are intended to protect the due process rights of absent class members. *See, generally, Amchem*, 521 U.S. at 625-629.

This Court has previously held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). In a class action for money

damages, rights to receive notice and the subsequent ability to opt out of the class cannot be abridged: "[W]e hold that due process requires **at a minimum** that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).[7]

Settlement classes, in any setting, present serious potential for abuse. *See, e.g.*, Manual for Complex Litigation, Second, *supra*, § 30.41, at 236 ("As a practical matter, the dynamics of class action settlement may lead the negotiating parties — even those with the best of intentions — to regard the interests of the class members too lightly."). Indeed, all participants in class action settlement negotiations have extraordinary incentive to settle. From the perspective of defendants, settlement is an opportunity to cap risk. From the perspective of the courts, settlement may be an

7. Indeed, few activities are subject to more extensive record keeping than military service; if the rights of future claimants can be abolished in this context without individualized notice, then the implications are unlimited. By contrast, in an early decision regarding Rule 23 requirements, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), this Court demonstrated the full extent to which the rights of individual class members must be safeguarded. *Eisen* raised the issue of adequate notice in a Rule 23(b)(3) antitrust and securities class action with millions of members and a class representative with only a $70 stake. Despite the size of the individual claims, this Court held that the class could proceed only with individual notice to more than two million class members whose names and addresses could be identified with reasonable effort, holding that "[i]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." Significantly, the Court in *Eisen* stated that such notice was required so that each individual class member "may request exclusion from the action and thereby preserve his opportunity to press his claim separately. . . ." *Id.* at 176. *See also Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351 (1983) ("*Eisen's* notice requirement was intended to inform the class member that he could 'preserve his opportunity to press his claim **separately**' by opting out of the class." (emphasis in original)).

opportunity to clear court calendars of tens of thousands of cases. And, not least of all, from the perspective of class counsel, the economic rewards of settlement sooner rather than later can be extraordinarily enticing — regardless of the inchoate needs of absent class members or future claimants. For these reasons, adequate representation of absent claimants has become one of the cornerstones of due process guarantees in class actions, requiring, among other things, that class representatives and their counsel are aligned identically with the interests of absent class members. As this Court emphasized in *Hansberry v. Lee*, 311 U.S. 32, 45 (1940):

> [S]election of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires.

The record of the litigation leading to the purported class action settlement of future claims demonstrates the risk of conflict and collusion which arises when both sides no longer are adversaries but both now want the settlement to proceed. That is precisely when adequacy of representation becomes crucial and all members of the settlement class must have their day in court. As this Court has stated:

> Procedural due process is not intended to promote efficiency . . . it is intended to protect the particular interests of the person whose possessions are about to be taken. . . . '[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize

> praiseworthy government officials no less, and perhaps more, than mediocre ones.'

Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) (*quoting Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).[8]

Petitioners knew that when the class was certified there was no analysis of the adequacy of the class representatives. Class representatives had not even been named. Petitioners knew, too, when the class action was settled that there were no class representatives to represent persons without any manifest injury — like Stephenson and Isaacson — who had been added to the broadly re-defined class after the opt out deadline passed.

Petitioners knew it was dangerous to change the class definition after certification and the opt out period had passed. Despite their misleading representations to the Court in their brief, Pet. Br. 35, they knew that persons like Respondents here, with future claims, never had a chance to opt out at all. They knew that even though the class definition had been broadened after the opt out time had passed, the methods of distribution of the notice would reach much fewer veterans.

Each of the Petitioner chemical companies also had their own staff of scientists and toxicologists and internal documents show Petitioners were well aware of the toxicity of the herbicides used in Agent Orange. Documents of public record in later herbicide litigation show a many year pattern of cover-up about their knowledge of the toxicity of 2,4,5-T and 2,4-D and the presence of toxic impurities and contaminants such as dioxin in their herbicide products.

They had to know of the long latency periods often required for development of cancer and other fatal diseases from exposures to toxic chemicals. Even the District Court was aware of that. Thus, with the passage of time since the first agricultural and production uses of these herbicides, Petitioners had to know that it was likely there would be increasing incidence of disease

8. *See also In re: General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1133 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979) ("convenience and expediency cannot justify disregard of the individual rights of even a fraction of the class").

and increasing knowledge of the potential association with their herbicides.

Thus, while the plaintiffs' lawyers had limited resources and great incentive to settle, the chemical companies knew that they needed this protection because they knew they had a ticking time bomb of medical and other documentary evidence that would be generated, or come out of their files, to establish causality by the time that future victim's medical conditions associated with Agent Orange exposure developed.

They therefore took a risk. They took the risk that for payment of a sum of money to provide nuisance value settlements to persons with present claims, that they could also buy the rights of unsuspecting future victims to have their day in court, if and when an Agent Orange associated disease became manifest.

They cry that they bought their peace, but they should have known then that it was a defective peace. They cannot have a legitimate expectation of peace when they knew how utterly flawed the settlement was and how unprecedented it was to impose a mandatory class on future claimants that provided no compensation at all if the claimant had the misfortune of having his or her disease manifest after 1994.

Petitioners knew that they had no legal bases to take those rights from the unsuspecting future victims of their wrongdoing. Nevertheless, they did so and had nearly 20 years of peace. But they were not bona fide purchasers of these rights. They can have no legitimate claim to have bought a peace when they knew that the peace was flawed.

II. Petitioners Had The Right And Duty To Attempt To Cure The Defects They Knew Flawed This Settlement

Amici doubt that there is any way consistent with Due Process and Rule 23 to cure defects in a class action settlement that includes future claimants without any present injury, who have no right to opt out, who have no notice or opportunity to object and who receive no compensation. Petitioners conceded in court, several years before the settlement was reached, that they, along with the court and plaintiffs' counsel had an

obligation to ensure that any class action was fair to the absent class members. JA 50-60. Contemporaneous case law confirms that Petitioners had standing to ensure that the class action complied with the rules and due process. *See Shutts*, 472 U.S. at 798.

Despite their vigorous — and well taken — objections to the broad and pervasive class that the plaintiffs in the Agent Orange litigation sought to have certified, and despite their obvious knowledge of other deficiencies in the settlement, Petitioners did nothing to correct these flaws. Petitioners could have protected themselves against the prospect of collateral attack of the settlement by maximizing the protections for absent class members. They could have insisted that better notice to the broader class be given. They could have ensured that there was adequate representation for each new subclass of persons that had been brought into the class by the re-definition for settlement. They could have provided funds to pay the cost of separate representation for this subclass, or at least required that a small fraction of the $180 million be designated for that purpose.

When Judge Weinstein indicated that he did not want to water down the available money by paying for multiple counsel, Petitioners could have volunteered to pay more if they wanted protection. They could have paid for more notice or sought to have it come out of the settlement proceeds.

Most importantly they could have made sure that there was another opportunity for opt out provided for future claimants after their injuries became manifest. Because they failed to do anything then to satisfy the requirements of Due Process and Rule 23 for their settlement, Petitioners are complicit in its fatal flaws. They had a chance to do what was necessary to try to protect the settlement, but they did nothing and should not now be heard to complain that it is subject to collateral review.

III. AMCHEM AND ORTIZ DID NOT CHANGE THE WELL SETTLED DUE PROCESS PRINCIPLES UNDERLYING THE REQUIREMENTS OF RULE 23 WHICH HAVE ALWAYS REQUIRED THAT CLASS REPRESENTATIVES SHARE IDENTICAL INTERESTS WITH ABSENT CLASS MEMBERS BEFORE THE ABSENT MEMBERS CAN BE BOUND

Petitioners charge it would be unfair to apply a new standard of review to their 1984 Agent Orange settlement based on what they claim is a major change in the law of class actions after the settlement was approved in 1985. They contend that *Amchem* and *Ortiz* changed the law and thus should not be applied retroactively. That characterization of *Amchem* and *Ortiz* is simply wrong. Indeed, what Petitioners are doing is trying to excuse their own complicity in the failures of the 1984 settlement. Petitioners knew in 1984 that the settlement for future claimants failed to meet the requirements of Rule 23 and Due Process. Those requirements were well known to them then and they argued for them at the time during the certification hearings. However, now that they are trying to defend this flawed settlement they want this Court to believe that somehow *Amchem* and *Ortiz* added some new requirements for approval of class settlements that should not be applied with hindsight.

Review of those cases shows clearly that both decisions were grounded on prior precedent that had been well settled for years before 1985. The only new aspect of either case was that for the first time the Court was asked to apply these well settled Due Process principles to a class action where lawyers for plaintiffs and defendants had agreed to settle both present and future claims as a part of a single class action. Nearly 50 years before the Agent Orange settlement was made and approved, this Court set forth clear guidance about the Due Process principles applicable to class actions. In *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), the Court stated at the outset that before prior litigation will be deemed to have res judicata effect on later suits the Court must perform a collateral review of both cases to ascertain whether the litigant has been afforded such

notice and opportunity to be heard as are requisite to the due process clause. (Citing *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 273 (1914)).

This Court then explained that class actions suits were an exception to the general rule "in Anglo American jurisprudence that one in is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Id.* Class actions were developed in equity as an exception to that rule where the number of parties is so great that joinder is impracticable. However, *Hansberry* set forth very clearly that for this exception to be constitutionally valid, the procedures for creating and litigating the class claims must ensure that the interests of the absent members and the class representatives are the same so that the latter fairly represents the former. Due Process has not been met when the procedures adopted do not ensure protection of the absent parties interests. *Id.* at 42.

Adequate representation is at the core of these constitutional concerns. Absent parties would be bound only if "the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest." *Id.* at 41. Conflicting interests among class representatives and absent class members "does not afford that protection to absent parties which due process requires." *Id.* at 45. Indeed, more than 50 years ago now, this Court expressed its strong concern that where there were such conflicting interests: "It would afford fraudulent and collusive sacrifice of rights of absent parties." *Id.*

Subsequently the Rules Committee adopted the numerous specific requirements of Rule 23. In both *Amchem* and *Ortiz* this Court showed that those requirements were bottomed on these same due process concerns. The principles articulated in *Hansberry* have thus been repeatedly re-affirmed both before 1985 and after.

In *Amchem*, the inquiry into the propriety of a future class began by looking at the historical roots of class actions under Rule 23. This Court found that the drafters of Rule 23 "had

dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem*, 521 U.S. at 617 (quoting Kaplan, Prefatory Note 497). This Court cited with approval language from a recent Seventh Circuit opinion:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Id. (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

In *Amchem*, this Court affirmed that in evaluating the propriety of any class action the dominant concern is that there must be sufficient unity so that absent members of class will be bound by representatives decision. *Amchem*, 521 U.S. at 621. The Rule 23 predominance requirement is not satisfied by simply shared exposure or by common interest in compensation without trial. *Id.* at 624-25. Focus must instead be on questions that are actually at issue and which create a genuine controversy. *Id.* Class representatives are not adequate under Rule 23 and due process when there are real or potential conflicts of interest. *Id.*

In affirming these well settled principles, this Court relied on case precedent that largely antedated the approval in 1985 of the Agent Orange settlement. The Court pointed out that the adequacy inquiry serves to uncover conflicts of interest. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58, n.13 (1982). The inquiry focuses on whether the injuries of the class representatives and the absent class members are the same or diverse. *See also East Texas Motor Freight System v Rodriguez*, 431 U.S. 395, 403 (1977) ("[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members.")

In *General Telephone* this Court found that "[t]he class-action device was designed as 'an exception to the usual rule that litigations is conducted by and on behalf of the individual named parties only.'" 457 U.S. at 155 (quoting *Califano v. Yamaski*, 442 U.S. 682, 700-701 (1979). When issues are common and result turns on questions that are applicable in the same manner to each member of the class, then class action saves resources and permits economical litigation. *Id*

In *Ortiz* the Court pointed out that *Hansberry* had articulated a core constitutional requirement that "the named plaintiff at all times adequately represent the interests of the absent class members." (citing *Shutts*, 472 U.S. at 812 (citing, in turn, *Hansberry*, 311 U.S. at 42-43, 45)).

Similarly, in *Shutts*, the Court relied extensively on *Hansberry*, finding that in 1985 the same constitutional principles were applicable and the same practical bases for class actions remained: class actions are proper where there are too many plaintiffs for proper joinder and class actions permit "the plaintiffs to pool claims which would be uneconomical to litigate individually." 472 U.S. at 809. The Court, based on *Hansberry*, held that Due Process requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Id.* at 809-10.

Class action litigation developed as an exception to general rules requiring individual standing and litigation to provide a means for individuals with small claims to join together, when joinder was impractical, to make pursuit of justice economically feasible. It was not developed, as Petitioners suggest, simply to provide defendants in litigation "utility," Pet. Br. 17, as a device to resolve masses of claims at one time, thereby binding many absent class members at the same time. While binding absent class members to a settlement or judgment is a necessary corollary to allowing persons with sufficiently similar claims to aggregate them in a class, it was not the reason that class actions developed. In fact, it is this binding of absent members which has consistently troubled this Court for many years from a constitutional and Due Process perspective. Consistent with

the Due Process elements in the determination of adequacy under Rule 23, class representatives can only bind absent class members when their interests in the real issues in controversy are sufficiently identical to permit the conclusion that those representatives will aggressively advocate for the absent class members, without conflict.

In all the above cases decided during or before 1985, the Supreme Court rejected class action certification or settlement because the class representative's interests were not sufficiently aligned with absent class members. Thus, it is entirely disingenuous to suggest that *Amchem* worked some sea change in class action law. With the highest quality lawyers representing them in 1985, Petitioners had to know that there were fatal adequacy and due process problems with a settlement of future claims, with no opt out right, and no class representative or counsel in court who could adequately represent their interests: someone who was without conflict of interest and whose interest and injuries were identical. Petitioner had to know in 1985 that it was a well settled and fundamental principle of class action law that the absent parties cannot be bound by such a class action settlement. It is not *Amchem* and *Ortiz* which worked a change in the law, it is Petitioners' unprecedented settlement which, if upheld to bind Stephenson and Isaacson, would radically alter this Court's prior class action jurisprudence.

IV. Any Unfairness That Would Result To Petitioners By Affirming The Second Circuit Pales In Comparison To The Unfairness To Respondent Veterans If This Court Should Reverse More Than 50 Years Of Settled Class Action Precedent And Deny Them Their Day In Court

Veterans of the armed services of the United States who served in Vietnam dedicated ~~their~~ hearts, minds, and bodies to protect the rights of all citizens of this country, to uphold the way of life of this country and the constitution of the United States. No group of citizens has a greater right to expect that in return for their dedication to preserving these rights, they would be able to enjoy for themselves the full protection of the laws of this country. Veterans have a right to rely on the judicial system

of our democratic and constitutional government and, in particular, their right to their day in court to have wrongs done to them while on active duty addressed fairly and fully, with zealous advocates fighting for them and them alone. What veteran would have expected that he or she could lose all rights to their day in court, **without any compensation**, as a result of a long ago class action settlement about which he or she had no knowledge or notice and no opportunity to opt out.

In *Ortiz* this Court took note of the tension between class actions, which can usurp the rights of absent class members to a trial by jury and "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quotation omitted). "Although 'we have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' . . . the burden of justification rests on the exception." *Id.* Petitioners have not met that burden.

In *Marbury v. Madison*, Chief Justice Marshall asked: "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?," *Marbury v. Madison*, 1 Cranch 137, 162, 2 L. Ed. 60 (1803). Chief Justice Marshall's response was clear: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* at 163, 2 L. Ed. 60.

Petitioners lament the "pernicious" effects that will result to the "utility" of the class action device if this Court affirms the Second Circuit. They claim that no class action settlement will ever be safe from attack, and finality and resolution of claims will never be achieved. This view of class actions that underlies Petitioners' argument turns class action law on its head. The class action "device" was not developed to protect wrongdoers who could, with one collusive settlement, sweep away all past and future liability.

Petitioner chemical companies plead that it would be unfair to them now after they have paid their money in reliance on an expectation of finality to allow Stephenson and Isaacson to proceed on their claims. These pleas for fairness ring hollow in the light of Petitioners knowledge of the fatal constitutional and Rule 23 flaws in that settlement and their knowledge of the toxic properties of their products that were sprayed indiscriminately and in massive quantities during the Vietnam war.

In contrast, veterans like Stephenson and Isaacson who survived the bullets and bombs of the enemy, are now suffering life threatening diseases, or are dying, without any chance of redress, even though they had no injuries at the time of the settlement and no basis therefore for making a claim then. How fair is it to these veterans that Petitioners want them to lose all right to have their day in court without compensation when they had no right to opt out of the expanded class for settlement and received no notice of the class settlement at all? How fair could it be, even if they had received notice, to require these veterans to intelligently evaluate the prospects of litigating the case for their injuries when their injuries had not yet manifested? How fair is it to require veterans without then a vested claim — a concrete injury in fact– to bear the expense in time, effort and money to investigate and litigate the propriety of a settlement which may never apply to him?

Given this expense there would be no reason that a then totally healthy veteran would choose to bear that expense on the speculative possibility that at some future time he might get some sickness from a long before exposure. While finality is certainly a proper goal of class action litigation that must be respected, it must not come as a result of violations of Due Process.

CONCLUSION

For all the foregoing reasons, *amici* respectfully pray this Court affirm the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

WILLIAM A. ROSSBACH
Counsel of Record
ROSSBACH BRENNAN P.C.
401 North Washington
Missoula, MT 59802
(406) 543-5156

P.B. ONDERDONK, JR.
NATIONAL JUDGE ADVOCATE
THE AMERICAN LEGION
P.O. Box 1055
Indianapolis, IN 46206

THOMAS A. O'CONNOR
O'CONNOR, MACDONALD & MAZA
FOR VETERANS OF THE
VIETNAM WAR, INC.
61 North Washington Street
Wilkes-Barre, PA 18703

Attorneys for Amici Curiae